2007

Bushco v. Utah State Tax Commission : Amicus Brief

Utah Court of Appeals

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IN THE SUPREME COURT
FOR THE STATE OF UTAH

BUSHCO, d.b.a. Babydolls Escorts, VALLEY RECREATION, Inc., d.b.a Kitty's Escort and Angel's Escort, THE D. HOUSE, L.L.C., d.b.a. The Doll House, Appellants, AMERICAN BUSH, INC. and DENALI, L.L.C., d.b.a. SOUTHERN EXPOSURE, Appellants in Intervention, vs. UTAH STATE TAX COMMISSION and PAM HENDRICKSON, R. BRUCE JOHNSON, PALMER DEPAULIS, and MARC B. JOHNSON, in their official capacities as members of the Utah State Tax Commission, Appellees.	Supreme Court No. 2007 0559-SC

BRIEF OF AMICUS CURIAE IN SUPPORT OF BUSHCO, d.b.a. BABYDOLL ESCORTS, ET AL., APPELLANTS.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE AUTHORITY

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

LEGISLATIVE MATERIALS

OTHER SOURCES

IN THE SUPREME COURT
FOR THE STATE OF UTAH

BUSHCO, d.b.a. Babydolls Escorts, VALLEY RECREATION, Inc., d.b.a Kitty's Escort and Angel's Escort, THE D. HOUSE, L.L.C., d.b.a. The Doll House, Appellants, AMERICAN BUSH, INC. and DENALI, L.L.C., d.b.a. SOUTHERN EXPOSURE, Appellants in Intervention, vs. UTAH STATE TAX COMMISSION and PAM HENDRICKSON, R. BRUCE JOHNSON, PALMER DEPAULIS, and MARC B. JOHNSON, in their official capacities as members of the Utah State Tax Commission, Appellees.	Supreme Court No. 2007 0559-SC

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
BUSHCO, d.b.a. BABYDOLL ESCORTS, ET AL., APPELLANTS.

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Utah ("ACLU of Utah") is a nonprofit, nonpartisan membership organization, founded in 1958. The ACLU of Utah is the state affiliate of the American Civil Liberties Union ("ACLU"), which was founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 300,000 members nationwide. The ACLU of Utah has more than 2,200 members.

The ACLU of Utah has been involved extensively in litigation and advocacy to protect the rights of speakers under the First Amendment. For instance, the ACLU of Utah is currently plaintiff and counsel in *The King's English v. Shurtleff*, 2:05-cv-00485-DB, a federal lawsuit challenging a variety of restrictions on Internet speech. Additionally, the ACLU of Utah has been involved in a myriad of cases to protect and uphold the First Amendment rights of Utah citizens, including the right to display signs, and protest in public fora.

STATEMENT OF FACTS

Amicus curiae adopt the appellants' statement of facts concerning the events resulting in this proceeding.

SUMMARY OF ARGUMENT

Title 59, Chapter 27 of the Utah Code allows the state of Utah ("the State") to place a severe financial burden on entities, solely on the basis of the content of the speech in which they engage. The speech in question, nude dancing, is afforded First Amendment protection under the United States Constitution. Content-based tax schemes are subject to strict scrutiny. Therefore, Title 59, Chapter 27 of the Utah Code cannot be upheld as constitutional unless the State can assert a compelling interest in selectively taxing entities based on content, and can demonstrate that the law implementing such action is narrowly tailored to achieve this end. The State cannot meet this heavy burden, as it cannot demonstrate that its interest in reducing the number of and providing

treatment for sex offenders in Utah justifies taxing businesses because they engage in a particular expressive message.

Even if this Court determines that Title 59, Chapter 27 of the Utah Code is a content-neutral regulation, the State cannot rely on its alleged interest in combating the secondary effects associated with sexually explicit businesses. The Utah Legislature did not rely on any evidence which demonstrates a reasonable believable connection between sexually explicit businesses and the incidence of sex offense.

Finally, if Title 59, Chapter 27 of the Utah Code is a content-neutral regulation, it cannot survive intermediate scrutiny as it is so broadly worded that it subjects lawful expressive conduct, such as theater and dance productions, to taxation, despite the fact that such activities clearly have no relation to the social ills the State claims it is targeting by way of this regulation. Accordingly, under either strict or intermediate scrutiny, Title 59, Chapter 27 of the Utah Code must fail as an unconstitutional violation of the First Amendment.

ARGUMENT

POINT 1. TITLE 59 CHAPTER 27 OF THE UTAH CODE IS A CONTENT-BASED REGULATION, WHICH SHOULD BE EVALUATED UNDER STRICT SCRUTINY REVIEW.

A. Title 59 Chapter 27 Of The Utah Code Targets Expressive Conduct Protected By The First Amendment.

Title 59 Chapter 27 of the Utah Code, entitled "Sexually Explicit Business and Escort Service Tax," (hereafter "the SEB Tax") is a content-based regulation that impermissibly imposes a substantial financial burden on speech, not merely conduct. The

First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The United States Supreme Court has interpreted the First Amendment to mean that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its contents." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see also Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). Furthermore, the Court has indicated that with respect to financial regulations, "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). Thus, tax schemes that attempt to impose penalties on entities singled out based on the content of their speech cannot survive constitutional scrutiny, absent a compelling state interest and demonstration that the regulation is narrowly drawn to achieve that interest. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

In the context of sexually oriented businesses, the First Amendment's prohibition on selective taxation based on content does not change. In *City of Los Angeles v. Alameda Books, Inc.*, a case concerning regulation of sexually explicit businesses, the Court specifically addressed the impropriety of imposing taxes based on the content of speech. 535 U.S. 425, 445 (2002) ("A city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. This is true even if the government purports to justify the fee by reference to secondary effects."). The Court's conclusion in this respect was motivated

by a concern that absent such a rule, a governmental entity might attempt to reduce secondary effects by reducing protected speech. *Id.*

Here, the Court's concern is abundantly warranted. The SEB Tax applies selectively, based solely on the protected content of communication of the First Amendment speaker. For example, a semi-nude dancing establishment is subject to the SEB tax on the basis of its chosen content (partially nude dance expression[1]) while a fully clothed dancing establishment is immune from regulation. Examining the content of an entity's message to ascertain tax liability is exactly the sort of evil the First Amendment sought to protect against. *See Arkansas Writers' Project*, 481 U.S. at 229 (invalidating a tax scheme as unconstitutional where "the basis on which [the state] differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*.").

Because the SEB Tax as enacted requires selective application based on content, the government must demonstrate that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. In cases where the government has asserted a compelling interest, but has been unable to demonstrate a connection between the interest and the resulting selective action, regulations have been invalidated. *See e.g. Arkansas Writers' Project*, 481 U.S. 221, 231 (recognizing state interest in raising revenue, but disavowing any relationship between the interest and selective

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[1] Nude dancing is entitled to federal constitutional protection. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). As such, the First Amendment prohibits the government from either restricting or unduly burdening nude dancing based on the content of the speech itself. *Id.*

taxation); *Minneapolis Star v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 586 (1983); *Carey v. Brown,* 447 U.S. 455, 467-469 (1980) (acknowledging the State's interest in preserving privacy by prohibiting residential picketing, but refusing to permit the State to ban only nonlabor picketing); *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (agreeing that State had a compelling interest in transferring the proceeds of crime from criminals to their victims, but invalidating a statute which required that accused or convicted criminal's income from works describing his crime be made available to victims of crime).

The Utah State Legislature undoubtedly has a compelling interest in treating the growing number of sex offenders within its borders. Sexually Explicit Business Tax and Escort Service Tax: Hearing on H.B. 239 Before H. Revenue and Taxation Comm., 2004 Leg., 55th Leg. Body (Ut. 2004) (statement of Rep. Duane Bourdeaux, member, H. Comm. on Law Enforcement and Crim. Justice). Moreover, it has an interest in raising revenue to obtain the funds necessary to provide such treatment. The State is not justified, however, in singling out entities to tax for this purpose, when the method of selection is done on the basis of constitutionally protected content.

B. Title 59 Chapter 27 Of The Utah Code Impermissibly Targets Speech, And Not Secondary Effects, As The Legislature Did Not Rely On Evidence That Demonstrates A Reasonable Believable Connection Between The Speech In Question And The Purported Secondary Effects Of That Speech: Sexual Offense.

Even if this Court determines that the SEB Tax is content-neutral, and was passed for the purpose of targeting negative secondary effects, the State has not met its burden of demonstrating that in passing House Bill 239 (the bill underlying the SEB Tax), it relied

upon any evidence "reasonably believed to be relevant to the problem that [the bill] addresses. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

The United States Supreme Court has held that where government restrictions on public nudity can be classified as content-neutral, they are evaluated under the *O'Brien* intermediate scrutiny framework. *See Pap's A.M.*, 529 U.S. at 289. A regulation survives the *O'Brien* test if 1) it is within the constitutional power of the Government to enact the statute, 2) the statute will further a substantial government interest, 3) the governmental interest is not substantially related to the suppression of free speech, and 4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien v. United* States, 391 U.S. 367, 377 (1968).

In developing the body of its First Amendment jurisprudence, however, the Supreme Court has wrestled with setting the standard necessary to establish the second prong in the *O'Brien* framework: the regulation serves a substantial government interest. *See e.g. Alameda Books, Inc.*, 535 U.S. at 438 (holding that a "municipality can[not] get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance."); *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (finding that the burden of proof is on the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."); *Barnes*, 501 U.S. at 583-86 (Souter, J., concurring) (concluding that the city was required to show secondary effects of the type relied upon in *Renton,* and not merely an interest in order and morality); *Renton*, 475

U.S. at 51-52 (stating that "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, **so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses**.) (emphasis added).

Thus, in the wake of *Alameda Books*, courts give considerable deference to the determinations of cities and governmental entities as to their rationale in enacting regulations that impact speech, so long as such entities can establish that they relied on at least some concrete evidence in support of their decision. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1199-1185, 1200 (10th Cir. 2003) (upholding a nudity ban as a constitutional content-neutral regulation targeting secondary effects where ban was enacted based on police reports and studies gathered by the city for over a year "regarding the connection between sexually oriented commercial business and [the] secondary effects [the city sought to combat.]"; *AAK, Inc. v. City of Woonsocket*, 830 F.Supp.99, 103-04 (D.R.I. 1993) (finding city licensing ordinance violated the First Amendment by charging higher fee for adult dancing license than for other dancing establishments and where city did not rely on any evidence of link between secondary effects and speech in enacting the scheme).

For example, in *AAK*, a city's licensing scheme was found unconstitutional where it set a higher fee for adult cabaret entertainment licenses than for other dancing establishments. *Id.* At 101-02. The court held that the ordinance violated the First Amendment on its face because it regulated on the basis of content. *Id.* at 103.

Additionally, the city could not claim that the ordinance was enacted to target secondary effects associated with adult cabaret establishments, as "the City conducted no investigation of any type prior to enacting this ordinance" and there were no "special law enforcement problems associated with [these establishments]." *Id.* at 104. Indeed, the court specifically noted that the "only justification offered by the city for the ordinance was its interest in 'societal order and morality,'"and that this was not sufficient to withstand constitutional muster. *Id.*

When the Utah Legislature ("the Legislature") passed House Bill 239, it created a law whereby controversial but constitutionally protected speech is singled out to be burdened by a substantial tax[2], simply because the content of that speech is disfavored. The Legislature asserted that the purpose of the law is to target the negative secondary effects associated with sexually explicit businesses, namely sex offenses. However, the Legislature made no attempt to ascertain any correlation between the number of sex offenders and the protected speech engaged in by so called sexually explicit businesses. Instead, at the House Committee Hearing, held on February 3, 2004, the sponsor of House Bill 239, Representative Duane Bourdeaux, merely asserted that "while most

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[2] *See* UTAH CODE ANN. § 59-27-103(1) (2004) (A tax is imposed on a sexually explicit business **equal to 10% of amounts paid to or charged by the sexually explicit business** for the following transactions: (a) an admission fee; (b) a user fee; (c) a retail sale of tangible personal property made within the state; (d) a sale of: (i) food and food ingredients as defined in Section 59-12-102; or (ii) prepared food as defined in Section 59-12-102; (e) a sale of a beverage; and (f) any service.) (emphasis added)

individuals who use sexually oriented businesses do not commit sex crimes, much like most people who smoke don't get cancer for those who do[sic], many sex offenders utilize these types of services." Sexually Explicit Business Tax and Escort Service Tax: Hearing on H.B. 239 Before H. Revenue and Taxation Comm., 2004 Leg., 55th Leg. Body (Ut. 2004) (statement of Rep. Duane Bourdeaux, member, H. Comm. on Law Enforcement and Crim. Justice). Additionally, the only study brought to the attention of the Legislature concluded that "a cause and effect" exists between paraphilia and sex offenders. *Id.* (statement of Kathy Okey, Utah Department of Corrections) Paraphilia is defined as "a pattern of recurring sexually arousing mental imagery or behavior that involves unusual and especially socially unacceptable sexual practices (such as sadism or pedophilia)." Merriam Webster Online Dictionary, http://www.m-w.com (last visited Nov. 16, 2007). Markedly absent from the legislative record is any evidence connecting sexually explicit businesses with paraphilia, or with any other negative effects.

Thus, the State has failed to establish that it relied on reasonably believable evidence in passing the SEB Tax. As such, the assertion that the law exists solely to combat the negative secondary effects related to sexual explicit businesses is flawed and unsupported. Absent secondary effects as a rationale, the SEB Tax appears to be nothing more than a regulation aimed at driving an unpopular form of expressive conduct out of business by way of an unduly burdensome tax.

C. Even If The State's Purported Goal Of Combating Secondary Effects Is Valid, Chapter 59, Title 27 Imposes A Substantial Restriction On Appellants' First Amendment Freedoms, Which Is Greater Than Necessary To The Furtherance Of Its Interests.

Again, assuming *arguendo*, that the SEB Tax is deemed a content neutral regulation, it must also satisfy the fourth prong of the *O'Brien* test: the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the government's interest. 391 U.S. at 377. The SEB Tax cannot meet this standard.

In evaluating regulations with respect to this fourth prong, the Court has repeatedly announced that "even content-neutral regulations must be 'narrowly tailored' to advance the interest asserted by the State. A regulation is not 'narrowly tailored'-even under the more lenient [standard applicable to content-neutral restrictions]-where ... a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." *Simon & Schuster,* 502 U.S. at 122, n.* (internal quotation marks omitted); *see also NAACP v. Button,* 371 U.S. 415, 438 (1963) (citations omitted) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone....").

Likewise, in cases dealing specifically with sexually explicit business restrictions, courts have held that regulations that "punish[ ] a 'substantial' amount of protected free speech, 'judged in relation to [their] plainly legitimate sweep," are unconstitutionally overbroad. *Conchatta Inc. v. Miller*, 458 F.3d 258, 268 (3rd Cir. 2006); *see also Odle v. Decatur County, Tenn.*, 421 F.3d 386, 399 (6th Cir. 2005) (finding an ordinance unconstitutionally overbroad because it " 'makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, [it] sweeps within its ambit expressive conduct not generally

associated with' the kinds of harmful secondary effects it was designed to prevent.") (citations omitted); *Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 516-17 (4th Cir. 2002) (finding likelihood of success on overbreadth claim where liquor-license regulation swept "far beyond bars and nude dancing establishments" to burden "a multitude of mainstream musical, theatrical, and dance productions-from musical comedy to ballet to political satire to flamenco dance"); *Schultz v. City of Cumberland,* 228 F.3d 831, 849 (7th Cir. 2000)("When the government restricts speech not associated with harmful secondary effects, then the government cannot be fairly said to be regulating with those secondary effects in mind and the regulation extends beyond its legitimate reach.").

The SEB Tax, like many of the regulations that have been struck down as unconstitutionally overbroad in other jurisdictions, potentially applies to many establishments whose activities have no relationship to the State's interest in combating the alleged social ills attendant to sexually explicit businesses. The language of the SEB Tax demonstrates that it applies to *any* business

> **at which any nude or partially denuded individual,** regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, **performs any service**: (a) personally on the premises of the sexually explicit business; (b) during at least 30 consecutive or nonconsecutive days within a calendar year; and (c) for: (i) a salary; (ii) a fee; (iii) a commission; (iv) hire; (v) profit; or (vi) any amount similar to an amount listed in this Subsection (4)(c).

UTAH CODE ANN. § 59-27-102(4) (emphasis added).

Nothing in the language of the SEB Tax prevents its application to theater, dance or other art groups, models hired to pose for art classes or any other legitimate form of

expression that involves nudity.[3] With respect to these forms of entertainment in particular, it would no doubt prove difficult to procure evidence establishing that the SEB Tax prevents the secondary effects of sexual offense. Accordingly, because the SEB Tax sweeps more broadly and impacts more protected speech than necessary to accomplish the State's goal of reducing and treating sex offenses, the SEB Tax cannot survive even the more lenient *O'Brien* intermediate level of scrutiny. As such, it must be declared unconstitutional.

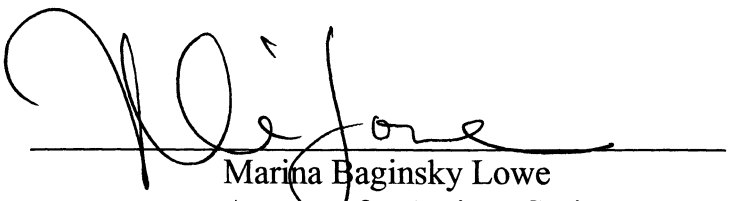
[3] Art is of course, entitled to full First Amendment protection. *See Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 603 (1998) ("art is entitled to full protection because our 'cultural life,' just like our native politics, 'rests upon [the] ideal' of governmental viewpoint neutrality").

CONCLUSION

The central tenant of the First Amendment is to protect the right of citizens and entities to engage in unpopular speech. Thus, any action by the government to interfere with this right and to discriminate on the basis of the content of speech undermines this protection. Government is entitled to enact laws to protect its citizens from social ills, but must do so in a way that is narrowly tailored to target only that conduct that is problematic, and that preserves the ability of entities to engage in protected speech. For these reasons, as well as those set forth in Appellants' brief, we urge the Court to find that the SEB Tax is an unconstitutional violation of Appellant's First Amendment Rights.

Dated this 16th day of November, 2007.

American Civil Liberties Foundation of Utah, Inc.



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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE IN SUPPORT OF BUSHCO, ET AL., APPELLANTS to:

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